LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

Hubert E. Kelly, Esq.
550 West Washington
Phoenix, Arizona 85003
and
Wallace O. Tanner, Esq.
Tanner, Jarvis & Owens
3800 N. Central Avenue
Phoenix, Arizona 85012

Attorneys for Respondents:

James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota

November 5, 1975

I N D E X

Page

Opinion and Judgments Below . . 2

Jurisdiction 2

Questions Presented 3

Statement of the case 3

Arguments

I. 6

II 9

III. 10

IV 11

Conclusion 13

Certificate of service 14

CITATIONS

	Page
Aluminum Co. of America, United States v. . . . . 44 F. Supp. 97 (D.C.N.Y. 1941)	11
American Ry. Express Co. v. Commonwealth of Kentucky . 273 U.S. 269 (1927)	2
Birnbach, United States v. . . 400 F.2d 378 (8th Cir. 1968)	11
Bowles v. Skaggs . . . . . 151 F.2d 817 (6th Cir. 1945)	8
Brown v. Board of Education . 349 U.S. 294 (1955)	8
Century Investment Corp. v. United States. . . . . 250 F.2d 139 (9th Cir. 1958)	9
Chapman v. Sheridan-Wyoming Coal Co. . . . . 338 U.S. 621 (1950)	9
Cocke v. Transamerica Title Insurance Co.. . . . . 16 Ariz. App. 556, 494 P.2d 756 (1972)	4
Cocke, Francis M. v. Irwin S. Cantor, et al . . . . . No. 74-1532 (October Term, 1974). certiorari denied October 6, 1975, petition for rehearing filed October 29, 1975	2, 5
Cocke v. James Stewart Co., et al.. . . . . CIVIL NO. 1-CA-CIV-2306 (Ariz. App. Feb. 24, 1975)	5

Page

Cross Lake Shotting & Fishing Club v. Louisiana 2
224 U.S. 632 (1912)
Goodman v. Newzona 7, 8
101 Ariz. 470, 421 P.2d 318 (1967)
Hecht Co. v. Bowles 9
321 U.S. 321 (1944)
James Stewart Co. v. Cocke . 3, 4
Civil No. C 222472, Maricopa County, Ariz. Super. Ct., filed April 22, 1969
Klein v. Shell Oil Co. . . . 6
386 F.2d 659, 663 (8th Cir. 1967)
McNulty v. Heine 6
137 F. Supp. 508, 511 (D.Md. 1956)
Muniz, United States v.. . . 12
374 U.S. 150 (1963)
Provident Tradesmens Bank & Trust Co. 10
390 U.S. 102, 119
S.S. Silberblatt, Inc. v. United States 11
353 F.2d 545 (5th Cir. 1965)
Securities & Exchange Commission v. Frank . . . 10
388 F.2d 486 (2nd Cir. 1968)
Travelers Insurance Co. v. Dunn. 11
228 F.2d 629 (5th Cir. 1956)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

This is a brief in opposition to the petition of Francis M. Cocke for a writ of certiorari to review the order entered by the Court of Appeals for the State of Arizona on February 24, 1975. The brief is due on November 10, 1975.

OPINION AND JUDGMENTS BELOW

Respondents agree with the petitioner's summary of the opinion and judgments below.

JURISDICTION

Respondents do not agree with petitioner's statement of jurisdiction in this court. To invoke the jurisdiction of the court under 28 U.S.C. § 1257(3) requires that a substantial federal question be presented. Save in exceptional circumstances, this court must accept as controlling a decision of the state courts on questions of local law, both statutory and common. American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269 (1927). Moreover, impairment of contract by judicial decision does not raise a federal question. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632 (1912).

Respondents also maintain that the instant petition is merely a restatement of petitioner's prior petition in Francis M. Cocke v. Irwin S. Cantor, et al, No. 74-1532 (October Term, 1974), certiorari denied October 6, 1975, Petition for Rehearing filed October 29, 1975.

Upon the foregoing reason, the court has no jurisdiction under 28 U.S.C. § 1257(3) and the petition should be denied.

QUESTIONS PRESENTED

Whether the state court had jurisdiction to enter the judgment in the suit for specific performance and damages between the buyers and petitioner, and whether, as a matter of state law, it erred in so doing.

STATEMENT OF THE CASE

Initially, this action arises out of a real estate transaction and resulting state court litigation. Respondents are the vendees and escrow agents involved in the transaction.

In 1964, petitioner and his ex-wife made a property settlement agreement, pursuant to which a trust was established. They were divorced in 1967. Certain property held by them and the trustee was agreed to be sold in 1968 to James Stewart Company (or its nominee the respondents Horne). Transamerica Title Insurance and Trust Company (hereinafter referred to as Transamerica) was the escrow agent. A dispute arose between the petitioner and his ex-wife over payment instructions and after the refusal of the petitioner to execute certain documents, the buyer brought suit for specific performance. James Stewart Co. v. Cocke, Civil No. C-222472, Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969. Transamerica was joined in this action as an additional defendant by petitioner seeking damages for the alleged mishandling of the escrow transaction. It answered and counterclaimed against petitioner,

seeking attorneys' fees and costs. Thereafter, it moved for summary judgment which was granted, resulting in an award of attorneys' fees. The underlying payment dispute between petitioner and his ex-wife was litigated in post-divorce proceedings in which the court held, among other things, that the sale property had been placed outside of the trust. Cocke v. Cocke, Civil No. D-89833 (Maricopa Cty., Ariz. Super. Ct., filed December 31, 1968 and March 15, 1969), aff'd. 13 Ariz. App. 57, 474 P.2d 64 (1970).

In a series of judgments, the state trial court dismissed the petitioner's counter and crossclaims against his ex-wife and other parties in the specific performance action, James Stewart Co. v. Cocke, supra, (November 10, 1970), aff'd. sub. nom., Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), and entered judgment against petitioner ordering the sale consummated. James Stewart Co. v. Cocke, supra, (September 27, 1972). A subsequent appeal to the Arizona Court of Appeals was dismissed on the grounds of not being timely filed. James Stewart Co. v. Cocke, Civil No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). Following denial of petitioner's motion for rehearing, he refused to comply with the judgment of September 27, 1972 and respondents James Stewart Company and the Hornes, upon application to the state trial court, obtained a writ of assistance to enforce the September 27, 1972 judgment. (Petitioner's appendix, pp. 130-152)

Thereafter, petitioner brought suit under the Civil Rights Act in federal district court in Arizona. Respondents here, and others, were defendants in that action, all of whom filed motions to dismiss on various grounds. The district court dismissed petitioner's complaint with prejudice and, upon appeal, the Ninth Circuit Court of Appeals affirmed. Petitioner filed a petition for certiorari in this court which was denied. See Francis M. Cocke v. Irwin S. Cantor, et al, No. 74-1532 (October Term, 1974), certiorari denied October 6, 1975, petition for rehearing filed October 29, 1975.

In the interim, on November 27, 1974, petitioner filed a second appeal from the judgment entered on September 27, 1972, as well as other judgments and orders taken against petitioner in real estate transactions ranging in time from November 10, 1970 to September 30, 1974. Respondents James Stewart Company and the Hornes moved to dismiss that appeal as (1) frivolous, and (2) untimely; and for sanctions on grounds that the appeal was not instituted in good faith. On November 24, 1975, the Arizona Court of Appeals dismissed petitioner's appeal. Cocke v. James Stewart Co., et al, CIVIL NO. 1-CA-CIV-2306 (Ariz. App. Feb. 24, 1975) See petitioner's appendix, Vol VI pp. 542-546. Subsequent motions for rehearing and petition for review to the Supreme Court of Arizona followed without success and this petition was initiated.

ARGUMENTS

Petitioner contends that three state court judgments were entered without subject matter jurisdiction. The three grounds for this contention are set forth in page 10 of petitioner's petition for writ of certiorari and are referred to as alteration of contract, indispensable parties, and want of findings.

I.

Petitioner contends that the buyer's judgment of September 27, 1972 fundamentally altered the escrow agreement for the sale and purchase of land, and that the court was plainly without jurisdiction to render judgments which altered the agreement of the parties. Respondents maintain that there was no fundamental alteration of the escrow agreement and that the state court was acting in the full scope of its equity powers.

The dispute in the instant case, centers around a suit for specific performance brought by the buyers, James Stewart Co., pursuant to an escrow agreement. The authorities are unanimous in holding that the remedy of specific performance is purely equitable in nature. Klein v. Shell Oil Co., 386 F.2d 659, 663 (8th Cir. 1967). The state court was, therefore, acting as a court of equity. Equity jurisdiction is exercised in personum and depends on the court's control over the person of the parties. McNulty v. Heine, 137 F. Supp. 508. 511 (D. Md. 1956), and the cases cited therein. It

is an established principle that where the parties are before a court of equity, it has jurisdiction to decree specific performance of a valid contract. 81 C.J.S. Specific Performance § 115 pp. 648-49. The state court, in the buyer's suit for specific performance, had jurisdiction over both the defendants and the property involved in the agreement. Petitioner himself invoked the jurisdiction of the superior court in June, 1969 in his answer and counterclaim. Further, the legal description of the real property attached to the complaint shows that the property involved in the state court litigation was located in Maricopa County and was, therefore, clearly within the state court's jurisdiction. Respondents respectfully submit that the state court, having jurisdiction over the person and property of petitioner, had jurisdiction to enter the judgments which petitioner now seeks to relitigate.

Petitioner argues that the state court fundamentally altered the escrow agreement and that it was without the power to do so. In support of this proposition, petitioner cites Goodman v. Newzona, 101 Ariz. 470, 421 P.2d 318 (1967). Respondents maintain that Goodman is distinguishable from the instant case because there the court was enforcing the contract as written, inasmuch as to do otherwise would have defeated the intent of the parties. The plaintiff, in Goodman, brought an action asking that a deed be declared void and that Newzona be declared to have no right, title or interest in the

property. The agreement between Goodman and Newzona contained a full performance clause which was expressly stated to be a condition precedent to the right of conveyance and the right to performance. The court stated that where the parties bind themselves by a lawful contract, a court must give effect to the contract as it is written and the terms of the contract are conclusive where they are clear and unambiguous. The intent of the parties, in Goodman, was clear and the contract could not be altered to eliminate the full performance clause without defeating that intent. In the instant case, the court merely imposed a different date for compliance with the agreement. This, in no way defeated the clear intent of the parties, but served to further it.

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies. Brown v. Board of Education, 349 U.S. 294 (1955). It is well established that an equity court has the power to mold its remedies to the needs of a particular situation. Bowles v. Skaggs, 151 F.2d 817 (6th Cir. 1945). The agreement in the instant case provided for a 13-day grace period for compliance. The September 27, 1972 judgment ordered that the annual installments due by the buyers "shall commence one year after the expiration of the period for appeal." Petitioner contends that the September 27, 1972 judgment altered the escrow agreement by adding thereto some four years and eight months. However, the essence of equity jurisdiction is the power of a

judge to do equity and to mold each decree to the necessities of the particular case. Hecht Co. v. Bowles, 321 U.S. 321 (1944). Equity will administer such relief as the exigencies of the case demand at the close of a tria Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621 (1950) [emphasis added]

Respondents respectfully submit that the state court judge was acting within his broad discretionary powers in granting equitable relief. Century Investment Corp. v. United States, 250 F.2d 139 (9th Cir. 1958), cert. denied 356 U.S. 950. The state court, therefore, had proper jurisdiction to render the judgment of September 27, 1972 extending the time for compliance.

II.

Petitioner contends that the state court had no jurisdiction to enter judgment in the absence of an indispensable party, Transamerica Title Insurance Company. In support of this contention, petitioner further claims that Transamerica was never joined by the buyers in their suit for specific performance. However, respondents would point out that Transamerica was before the court because it was joined by petitioner himself in a counterclaim seeking damages for the alleged mishandling of the escrow transaction. In addition, the district court addressed itself to this issue saying:

> "It is well settled that the considerations in Rule 19(b) [F.R.C.P.] are equitable, not jurisdictional. 'To say that a

> court must dismiss in the absence of an indispensable party and that it cannot proceed without him puts the matter the wrong way around: a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him.'" Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119. [Brackets supplied]

Respondents respectfully submit that because Transamerica was properly before the state court and because Rule 19 considerations are equitable, not jurisdictional, petitioner's second jurisdictional argument is without merit.

III.

Petitioner contends that the court's failure to make sufficient findings was a jurisdictional defect and, therefore, a violation of the right to due process. Respondents maintain, however, that want of findings is not a jurisdictional defect and that the findings of the state court were sufficient.

Findings are not a jurisdictional requirement, but only aid appellate courts in reviewing the decision below. Securities & Exchange Commission v. Frank, 388 F.2d 486 (2nd Cir. 1968). The purpose of requiring a trial court to state facts specifically is to aid

the appellate court in its review, and merely indicating a factual basis for ultimate conclusions will suffice in most cases. United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968). In the instant case, the trial court made findings (see petitioner's appendix pp. 119-123). Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired. Travelers Insurance Co. v. Dunn, 228 F.2d 629 (5th Cir. 1956). Petitioner, citing United States v. Aluminum Co. of America, 44 F. Supp. 97 (D.C.N.Y. 1941), asserts that an equity court must make meticulous findings. In Aluminum Co., however, the trial court made an oral opinion in a complex antitrust case and the court of appeals found the findings insufficient. The findings in the instant case, however, were sufficient to indicate a basis for the court's conclusion. Findings of fact need only be made in sufficient detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court. S.S. Silberblatt, Inc. v. United States, 353 F.2d 545 (5th Cir. 1965). Respondents respectfully submit that sufficient findings were made and that want of findings is not jurisdictional. Petitioner's third contention therefore fails.

IV.

Rule 19 of the Rules of the Supreme Court states that:

> "A review on writ of certiorari is not a matter of right, but of sound

> judicial discretion, and will be granted only where there are special and important reasons therefor."

Certiorari will be granted when the decision below involved an important question of construction of a federal statute and when two or more courts of appeals had previously reached a contrary result. United States v. Muniz, 374 U.S. 150 (19). Petitioner has not shown any question of construction of a federal statute and has failed to show any conflict between the circuits. Rule 19 also establishes that certiorari will be granted,

> "where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Petitioner has simply failed to set forth any reason for granting of the writ. Respondents respectfully submit that there is no federal question involved in the instant case and there is no showing by petitioner of any conflict of circuit decisions with each other or with decision of this court.

CONCLUSION

For the reasons set forth above, respondents respectively submit that the petition for certiorari should be denied.

Respectfully submitted,

s/ Hubert E. Kelly
Hubert E. Kelly
550 W. Washington
Second Floor
Phoenix, Arizona 85003

and

TANNER, JARVIS, OWENS & HOYT

By s/ Wallace O. Tanner
Wallace O. Tanner
3800 N. Central Avenue
Phoenix, Arizona 85012

Attorneys for respondents

James Stewart Company, M. Seth Horne, Maurine D. Horne and Title Insurance Company of Minnesota

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1975, three copies of the brief in opposition to petition for a writ of certiorari were hand delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

Richard L. Thompson
132 S. Central Avenue, Suite 7
Phoenix, Arizona 85004
Counsel for petitioner

Powell B. Gillenwater
Browder & Gillenwater, P.C.
2304 First Federal Savings Bldg.
3003 N. Central Avenue
Phoenix, Arizona 85012
Counsel for respondent Transamerica

Loretta S. Whitney
603 Luhrs Building
Phoenix, Arizona 85003
Counsel for respondent
John H. Cocke

George Sorenson, Jr.
609 Luhrs Building
Phoenix, Arizona 85003
Counsel for Dorothy Cocke
Haimovitz and Elizabeth
Cocke Francis

s/ Hubert E. Kelly
Hubert E. Kelly
550 W. Washington
Second Floor
Phoenix, Arizona 85003

and

TANNER, JARVIS, OWENS &
HOYT

By s/ Wallace O. Tanner
Wallace O. Tanner
3800 N. Central Avenue
Phoenix, Arizona 85012

Attorneys for respondents

James Stewart Company,
M. Seth Horne, Maurine D.
Horne and Title Insurance
Company of Minnesota